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**SUPREME COURT OF THE STATE OF NEW MEXICO**
**PETITION FOR A WRIT OF CERTIORARI TO THE**

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THE FEDERAL LAND BANK OF WICHITA, Respondent

v.

E. B. BURCETT AND WINNIE BURCETT, Petitioners

---

**No. 77- 1 9 E - 7 7**

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OCTOBER TERM, 1977

**Supreme Court of the United States**

IN THE

MICHAEL RODAK, JR., CLERK
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IN THE

# Supreme Court of the United States

October Term, 1977

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No. 77-

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E. B. Burgett and Winnie Burgett, Petitioners

v.

The Federal Land Bank of Wichita, Respondent

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

---

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Mexico entered in the above case on June 13, 1977.

### OPINIONS BELOW

The Final Decree of the District Court of Otero County, New Mexico, Twelfth Judicial District, granting Default Judgment in favor of Respondents and against Petitioners, foreclosing petitioners' mortgage, ordering judicial sale of petitioners' property, and ordering execution on any deficiency after sale against petitioners, is unreported. The Order of the District

Court of Otero County, New Mexico, supported by Findings of Fact and Conclusions of Law, denying petitioners' motion to set aside the default judgment and vacate the sale of the foreclosed property is also unreported. Copies of the Decree, Order, and Findings of Fact and Conclusions of Law are appended to this petition in Appendices A, B and C at pages 1a, 7a, and 11a, respectively. The decision of the Supreme Court of the State of New Mexico affirming on appeal the Order of the District Court was filed without an opinion and is reported at 90 N.M. ———————. The Order of the Supreme Court of New Mexico denying petitioners' motion for rehearing is reported at 90 N.M. ———————.[1]

## JURISDICTION

The Decision of the Supreme Court of the State of New Mexico was made and entered on June 13, 1977. Petitioners' motion for rehearing was denied by Order of the Supreme Court on June 30, 1977. Copies of the decision and the order are appended to this petition in the Appendices D and E pages 12a and 13a, respectively.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## QUESTIONS PRESENTED

Respondent, The Federal Land Bank of Wichita (hereinafter, Bank) filed suit on November 18, 1975, seeking judgment on a promissory note and foreclosure of the mortgage securing this note. Judgment on the

[1] Local counsel informs us that New Mexico does not publish advance sheets of their Supreme Court. These decisions will be reported in the yearly volume of New Mexico decisions published after the end of this year.



note was sought against E. B. Burgett, his wife, Winnie Burgett, his son Everett Dale Burgett, and two closely held New Mexico corporations controlled by them as makers of the note. The mortgage sought to be foreclosed was given as security for the note by E. B. Burgett and his wife as sole record owners of the subject property, in favor of the respondent bank.

On November 19, 1975 substituted service was made on E. B. Burgett and his wife by affixing copies of the Summons and Complaint to the door of their alleged "usual place of abode" pursuant to statutory authority in N.M.S.A. 1953, Section 21-1-1(4)(e)(1) which provides in pertinent part:

> "If the defendant be absent, service may be made by delivering a copy of the process or other papers to be served, to some person residing at the usual place of abode of the defendant, over fifteen (15) years of age; and if no such person be found willing to accept a copy then service shall be made by posting such copies in the most public part of the defendant's premises."

A Default Judgment was entered on August 5, 1976, against E. B. and Winnie Burgett (hereinafter the Burgetts) for their failure to appear and answer the Bank's complaint.

The Burgetts filed a motion to set aside the Default Judgment on the grounds that service of process was insufficient, the court lacked personal jurisdiction, and neither notice nor opportunity to be heard had been given.

The District Court of Otero County denied the Burgetts' motion and the Supreme Court of New Mexico affirmed this decision. The questions presented are:

1. Whether N.M.S.A. 1953, Section 21-1-1(4)(e)(1), which permits service solely by "posting" a copy of the Summons and Complaint on the most public part of the defendants' "premises" is reasonably calculated to give adequate notice as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the construction placed on the phrases "premises" and "usual place of abode" by the New Mexico courts, which permits a defendant to be served at a residence where he is not presently residing but to which he intends to return at some indefinite time in the future, is reasonably calculated to give adequate notice of the commencement of judicial proceedings as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provision involved is the Due Process clause of the Fourteenth Amendment to the United States Constitution:

> Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The state statute involved is New Mexico Statutes Annotated 1953 Comp. Section 21-1-1(e)(1):

(e) Summons—How Served



(1) [Making of Service] In civil causes summons and a copy of complaint may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action, over the age of eighteen (18) years. When served by the sheriff, proof thereof shall be by certificate and when served by a person other than the sheriff, proof thereof shall be made by affidavit. Such service may be made by delivering a copy of the process or papers to be served to the defendant; or if the defendant refuses to receive such copy, by reading same to said defendant; and if the defendant so refuses to receive such copies or hear the same read, such action shall constitute good service in law. If the defendant be absent, service may be made by delivering a copy of the process or other papers to be served to some person residing at the usual place of abode of the defendant, over fifteen (15) years of age; and if no such person be found willing to accept a copy, then service shall be made by posting such copies in the most public part of defendants' premises.

## STATEMENT

On November 18, 1975, the Bank filed its complaint against the Burgetts. On November 19, 1975, Emmett R. Owens attempted to serve process on the Burgetts at a house owned by them in the town of Maybill, Otero County, New Mexico, located in the mountains at a high elevation. The Burgetts had resided in this house until October of 1975 when due to medical reasons they had moved to a furnished trailer at 2700 West Washington in Artesia, New Mexico. E. B. Burgett is 80 years old and has developed respiratory problems over the past several years. During 1975, his doctors advised him to undergo surgery and to move to a lower elevation to ameliorate these problems. It

was in response to his physician's advice that Mr. Burgett and his wife moved to Artesia. The Burgetts have lived in Artesia since October, 1975 until at least September 19, 1976. Although no longer in Artesia, the Burgetts have never returned to the house in Maybill and continue to live at lower elevations.

When Mr. Owens attempted to serve process, he found no one at the house in Maybill. After personally serving Everett Dale Burgett, who lived in a house across the highway from the Burgetts' house, Mr. Owens asked him where the Burgetts could be found. Dale told Mr. Owens that his parents no longer lived at the house in Maybill but refused to disclose their present address in Artesia. He told Mr. Owens that his refusal was made to spare his father, who was seriously ill at the time, from what be regarded as undue distress and concern.

Mr. Owens then went to Cloudcroft, a nearby town, and asked Rex Briscoe, a police officer, where the Burgetts lived. Mr. Briscoe directed Mr. Owens to the house owned by the Burgetts in Maybill. Officer Briscoe told Mr. Owens that be believed the Burgetts still resided at the house in Maybill because be had seen E. B. Burgett recently at the post office in Cloudcroft. After returning to the house in Maybill, knocking on the door and finding no one present, Mr. Owens attached two copies of the Summons and Complaint to the backdoor of the Burgetts' house in Maybill. No other method or manner of service on the Burgetts was made or attempted. The commencement and pendency of this action were never communicated to the Burgetts either by Everett Dale Burgett or by any other person.



On January 20, 1976, the default of E. B. and Winnie Burgett was entered by order of the District Court of Otero County. On July 15, 1976, summary judgment was entered against Everett Dale Burgett, who appeared pro se. On August 5, 1976, the Final Decree of the District Court was entered granting respondent default judgment against the Burgetts and summary judgment against Everett Dale Burgett.

The judgment held the Burgetts and Everett Dale Burgett jointly liable on the promissory note, foreclosed the mortgage given by the Burgetts on property they owned as sole record owners securing the note, ordered judicial sale of the property, and execution of any deficiency after the sale.

On August 26, 1976, the Burgetts received by certified mail, return receipt requested, a copy of the judgment in this case. This copy was properly mailed by the Bank's attorneys to the Burgetts' current residence at 2700 Washington, Artesia, New Mexico, and not to their former residence, where service originally was attempted, in Maybill, New Mexico. Immediately upon receiving this judgment, the Burgetts' first knowledge of the action, they contacted counsel and on September 10, 1976, filed a Motion to Set Aside the Judgment. This motion was predicated on the ground that "no proper service of process was ever had on the Burgetts" since the posting of process was not done at the Burgetts' current residence and usual place of abode which was 2700 Washington, Artesia, New Mexico.

After an evidentiary hearing on the Motion, the District Court made findings of fact and conclusions of law and denied the Burgetts' motion to set aside the

judgment, holding that the Burgetts were properly served. The findings of fact and conclusions of law relied on by the District Court included: A finding that the Burgetts "were temporarily in Artesia, New Mexico, when service of process in this case was served"; a finding that Emmett Owens served the Burgetts "by firmly attaching" copies of the summons and complaint to "the most commonly used door" of their house in Mayhill, New Mexico; a finding that "no other attempt of service was ever made"; a finding that the Burgetts' "domicile, residence, usual place of abode and premises" was their house located in Mayhill, New Mexico, and not in Artesia, New Mexico; and a conclusion of law that the Burgetts "were properly served" and "had notice of this action."

It must be assumed that the conclusion of law that the Burgett's "had notice" of this action refers to constructive and not actual notice, since there is no evidence in the transcript of the hearing on the motion to support a finding that the Burgetts had actual notice and no such finding or conclusion was made by the District Court.

Following denial of the motion, the Burgetts appealed to the New Mexico Supreme Court. The Burgetts' appeal specifically challenged all of the District Court's conclusions of law including the conclusion that service of process was properly made on them. Although specific mention of denial of due process as the basis of the appeal was not made by the Burgetts' attorneys below, who relied primarily on the ground of insubstantial evidence to support a finding of proper service, there can be no doubt that the constitutional question was before the Supreme Court of the State



of New Mexico. The Burgetts' brief to the Supreme Court of New Mexico stated on page 6:

> "In this case before the Court, the Appellants have lost their property by Default Judgment without opportunity to plead their potential defenses."

In the Bank's Answer Brief, the question of denial of due process is discussed at some length on pages 5 and 6. The Decision of the Supreme Court of New Mexico affirming the District Court without opinion, held that substantial evidence supported the findings that notice was properly given by posting process at the Burgetts' usual place of abode. The Burgetts' motion for rehearing was also denied by the Supreme Court of New Mexico, again without opinion.

## REASONS FOR GRANTING THE WRIT

This case presents in stark relief the injustice which results when a court mistakenly exercises jurisdiction over persons who have no knowledge of the pendency of a law suit. The Burgetts are being subjected to personal liability and loss of their property without any opportunity to present defenses they might have. The procedure adopted by the State of New Mexico to give notice of court actions is, as this case demonstrates, often inadequate to accomplish that task and is nothing more than a pro forma exercise. Neither the federal rules [2] nor most states permit such a defi-

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[2] Federal Rules of Civil Procedure 4(d)(1) requires service upon individuals to be made either personally or by leaving copies of process with "some person of suitable age and discretion" who resides with the defendant at his "dwelling house or usual place

cient procedure to be employed.[3]

The importance of the question presented by this case is apparent. Every defendant's notice of his duty to appear and present his case comes from service of process. Therefore adequate service must satisfy the requirements of due process of law. Due process requires a statutory method of service reasonably calculated to put the defendant on notice of the action. As this Court recognized in *Wuchter* v. *Pizzuti,* 276 U.S. 13 (1928), the questions of the constitutional validity of the statute and of its construction remain regardless of whether actual notice was received by the defendant.

> "But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute, it cannot, therefore, supply constitutional validity to the statute or service under it." *Wuchter* v. *Pizzuti,* 276 U.S. 13 at 25.

It is true that actual notice to every defendant in every action has been held by this Court not to be a mandatory requirement. *Mullane* v. *Central Hanover Bank & Trust Co.* 339 U.S. 306 (1950). However, this court also stated in *Mullane, supra.* at 314:

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of abode." 4(d)(7) authorizes service on an individual "in the manner prescribed by the law of the state in which the district court is held."

[3] New York—Civil Practice Law and Rules § 308 (McKinney, 1972) Michigan—General Court Rules 1963, 105.1-.8 (Michigan Statutes Annotated, 1976) Minnesota—Rules of Civil Procedure 4.03(*a*) Minnesota Statutes Annotated Vol. 27A Court Rules. Of these three representative states only one (New York) explicitly permits posting at the "usual place of abode" and then *only* in conjunction with mailing to defendants last known address. Michigan may permit posting but only after a hearing and pursuant to court order. See General Court Rules 1963, 105.8 (Michigan Statutes Annotated, 1976)



> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

*Wuchter* requires that any statute governing service must be adequate on its face to provide notice to defendants. If this requirement is satisfied, *Mullane* requires that the statute, after consideration of all the circumstances of the case, be reasonably calculated to give notice.

### I. New Mexico's Procedure Governing Service of Process Does Not Satisfy Due Process in a Modern Society

New Mexico's statute governing service has been unchanged in its present form for over fifty years. What may have been adequate during the early twentieth century is not adequate today. Posting a summons at the usual place of abode or permises of a dedefendant without more and with only thirty days to respond before default is entered, is not reasonably calculated to provide notice given the realities of modern society. This inadequacy is particularly acute when a defendant's "usual place of abode" or "premises" is construed as being a residence where the defendant is not then residing and will not be returning for an extended period of time, if at all.

We live in a mobile society. In the last five-year period from March 1970 to March 1975, the total number of persons moving to a new residence was 79,838,-000. In the one-year period from March 1975 to March 1976, the figure was 35,645,000. This is 20,000,000 more in the last year than the yearly average for the pre-

ceding five-year period. Bureau of Census, Current Population Report Services p. 20 #305. The divorce rate per one thousand of population increased from 4.8 to 5.0 from 1975 to 1976 and has doubled during the past decade. Id. p. 20 #307. The number of unmarried and unrelated persons living together has increased from 1,619,000 in 1975 to 1,829,000 in 1976, an increase of over 200,000 in one year. Id. p. 20 #287.

Given such mobility, the likelihood of New Mexico defendants not receiving actual notice and an opportunity to challenge a law suit before a default judgment is entered is substantial under the New Mexico statutory procedure employed against the Burgetts in this case. The New Mexico statute permits the process server to post the summons and complaint at a conspicuous place at the defendant's "premises" should he find no one present at those premises. Nothing more is required by the statute to authorize such postinn other than merely arriving at the defendant's home when no one is there. The process server need not ascertain if the defendant still lives there, nor if he is on an extended absence, nor even if anyone still lives there. He simply posts process and completes an affidavit. In New Mexico he need not do anything more nor is he required to obtain prior Court approval of this procedure as is required in other states.[4]

Once service is made under the New Mexico procedure permitting posting alone, if notice is not received by the defendant, as it was not received by the Burgetts in this case, first knowledge of the action

[4] New York requires "nailing" and "mailing", Michigan requires a court order to authorize any procedure other than personal service. See footnote 2 *supra*.



occurs when the default judgment is received or execution on the judgment is attempted. The defendant's opportunity to challenge the plaintiff's allegations and present his defense depends upon the construction placed upon the phrase "usual place of abode." If, as in the Burgett's case, the New Mexico court finds, in conformity with New Mexico law and interpretation, that the defendant had an intention to return to the residence, even though he received no actual notice, was not present at the time and, in fact, was living somewhere else "temporarily", then posting of service occurred at the "usual place of abode." Such a finding satisfies the statutory requirement and, ostensibly, due process. The defendant then is denied any opportunity to challenge the judgment on the merits. Certainly, such a statutory procedure is not "reasonably calculated, under all the circumstances, to apprise interested parties of the action" prior to judgment being entered.

**II The Rule of Construction Applied to the Service Statute is Inadequate and Leads ot Anomalous Results Inconsistent with Due Process.**

The number of cases in both state and federal courts interpreting service made at the defendant's "usual place of abode" is great. These cases have dealt with such questions as service at a hotel when the defendant was a guest [5] and when the defendant was a resident; [6]

[5] *Leigh* v. *Lynton*, 9 FRD 28 (D.C. N.Y. 1949) Defendant a guest at the hotel where service was made. Held, this was not his "usual place of abode" and service was quashed.

[6] *First National Bank and Trust Co. of Tulsa* v. *Ingerton* 207 F 2d 973 (10th Cir., 1953) Service made at defendant's son's home in Colorado where defendant was visiting. Held, defendant's "usual

at the defendant's place of business when his residence was in the same building;[7] at the defendant's apartment building by leaving copies with the defendant's landlord,[8] or with a relative of the defendant who lived in a neighboring apartment in the same building;[9] at a prisoner's residence while he was in the penitentiary,[10] and other usual and unusual situations. These cases are confusing, involving detailed factual discussions leading to differing and often irreconcilable decisions. *First National Bank and Trust Co.* v. *Ingerton* 207 F 2d 793 (10th Cir., 1953). It has been suggested by the Fourth Circuit Court of Appeals in *Karlsson* v. *Rabinowitz* 318 F 2d 666 (CA 4th 1963) that the key factor in deciding such cases is the fact of actual notice and whether the defendant knew of the suit and challenged process before or after judgment. In a case where actual notice has been received, the Fourth Circuit held that the Federal Rule governing service

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place of abode" was a hotel in Raton, New Mexico, and service was quashed.

[7] *United States* v. *N. Tully Semel, Inc.* 88 F. Supp. 732 (D.C. Conn., 1949) Defendant's business and residence in the same building and service made on an employee. Held, service was not made at defendant's "usual place of abode" and service was quashed.

[8] *Pickford* v. *Kravetz* 17 F.R. Serv. 4d. 121, Case I (D.C.N.Y., 1952) Service at transient hotel where defendant had been living for only three days. Held, service valid.

[9] *DiLeo* v. *Shin Shu,* 30 F.R.D. 56 (D.C.N.Y. 1961) Service left with defendant's daughter who lived next door in the same building. Held, service was not made at defendant's "usual place of abode" and service was quashed.

[10] *Bohland* v. *Smith,* 7 F.R.D. 364 (D.C.Ill., 1947) Service made at defendant's residence where defendant's wife still resided although defendant was a prisoner in the penitentiary. Held, service valid at defendant's "usual place of abode."



FRCP 4(d)(1) "should be liberally construed to effectuate service and uphold the jurisdiction of the court, thus insuring the opportunity of trial on the merits." 318 F 2d 668. Although the District Court made a conclusion that the Burgetts "had notice", there is no finding or conclusion that they had *actual* notice, rather than constructive notice. Regardless of the resolution of this factual question, the constitutional question remains.

The Fourth Circuit in *Karlsson* and other courts facing this question have disregarded the constitutional implications of relating a legal conclusion of sufficiency of process to a factual finding of actual notice. Constitutional sufficiency of a statute and the construction placed upon the phrase "usual place of abode" should not be made to depend upon the fortuitous factual circumstance of actual notice being received in a particular case. To do so leads to anomolous results. Assume service is made upon a man by posting process on the door of a motel room which he has taken for an afternoon with his paramour and he receives actual notice. Following the *Karlsson* reasoning the phrase "usual place of abode" should be liberally construed to effectuate service leading to a conclusion of sufficient service of process. The result is a decision which holds that the phrase "usual place of abode" may be construed as a motel room taken for an afternoon and be constitutionally valid. This is clearly wrong. It is no less wrong to permit, in the Burgetts case, a construction of "usual place of abode" which includes a house owned by the defendants but where no one resided at the time of service and to which the defendant's never returned. The *Karlsson* rule should be reexamined by this court because it ren-

ders the restriction that service must be made at the "usual place of abode" protean and nearly meaningless.

### III. The New Mexico Service Statute is Unmatched in its Laxity and Violates Due Process of Law

Most of the statutes being interpreted in these cases, including *Karlsson,* permit service on another person of suitable age and discretion residing with the defendant at his usual place of abode.[11] This is in sharp contrast with the New Mexico statute which allows posting of process on the door of the "usual place of abode" if no one is present when the process server arrives. We know of no other jurisdiction which permits posting of a summons at an unoccupied residence alone to suffice for meeting the Constitutional requirement that service be reasonably calculated to give defendants actual notice of judicial proceedings.

The modern trend has been to extend the bases for acquiring personal jurisdiction and to relax the requirements of giving actual notice. New York is a good example. Prior to 1970, New York required personal service exclusively and only permitted substituted service of any kind pursuant to a court order after a hearing during which evidence of unsuccessful, good faith efforts to serve the defendant had to be submitted. In 1970 New York relaxed its requirements regarding service by amending CPLR § 308, (McKinney, 1972) in response to the growing problem of "sewer service."[12] The reasoning of the New York

[11] See Federal Rules of Civil Procedure 4(d)(1).

[12] For a description of the problem see 51 North Carolina Law Review, 1517 *Civil Procedure—A Possible Solution to the Problem of "Sewer Service" in Consumer Credit Actions* (1972)



legislature was that less onerous requirements of service would more likely be complied with and thereby give actual notice than the difficult requirement of personal service which was, in many instances, being completely disregarded.[13]

However, New York has not gone as far as New Mexico. Although New York now permits posting at the defendant's place of business or usual place of abode, this may be done only in conjunction with mailing to the defendant's last known address.[14] At least under this procedure, the post office may have a forwarding address should the defendant not return to the place where process was posted. New York's procedure may be constitutionally adequate and effective in solving the problems of "sewer service." However, New York or other jurisdictions might desire to go even further and adopt New Mexico's even more relaxed requirement of merely posting at the defendant's "usual place of abode." This New Mexico procedure has never been subjected to constitutional challenge. New Mexico's unique, minimal, and relaxed method for service of process is at the unmarked frontier of constitutional adequacy. In light of the trend to relax notice requirements, this Court should again consider how far that boundary extends.

Granting the petition for certiorari in this case will enable this Court to consider in light of fundamental changes in our society, the procedures adopted or which may be adopted by the states which must be designed to reasonably, and in the best available manner, effect the first fundamental requirement of due

[13] CPLR § 308 Practice Commentaries (McKinney, 1972)

[14] CPLR § 308(4) (McKinney, 1972)

process of law—notice of judicial proceedings. New Mexico's procedure as applied in this case raises serious questions of deprivation of property without due process of law. A decision from this Court resolving the questions in this case will do much to end the confusion presented by these constantly recurring questions of sufficiency of process and notice.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

IN THE DISTRICT COURT OF OTERO COUNTY, NEW MEXICO
TWELFTH JUDICIAL DISTRICT

THE FEDERAL LAND BANK OF WICHITA, a corporation
*Plaintiff*,

VS.

E. B. BURGETT, et al., and WINNIE BURGETT, his wife; EVERETT DALE BURGETT; BURGETT WHOLESALE FLORAL COMPANY, a New Mexico corporation; BURGETT FLORAL COMPANY, a New Mexico Corporation; MICHELLE IMPORTING COMPANY; DENVER WHOLESALE FLORISTS CO.; VAUGHAN-JACKLIN CORPORATION, d/b/a VAUGHAN SEED COMPANY; STATE OF NEW MEXICO EMPLOYMENT SECURITY COMMISSION; UNITED STATES OF AMERICA, *Defendants*.

### Final Decree

(Filed 8/5/76)

THIS CASUE having come on to be heard by the Court on the Motions of the Plaintiff for Judgment in accord with the prayer of the Complaint; the Plaintiff appearing by its attorney, Norman D. Bloom, Jr., of the law firm of FETTINGER AND BLOOM; the Defendant Everett Dale Burgett having appeared pro se; and the Defendants, E. B. Burgett, Winnie Burgett, Burgett Wholesale Floral Company, and Burgett Floral Company, having appeared not; and the Court having examined and considered the records and files herein and being sufficiently advised in the premises, FINDS:

1. That the Complaint of the Plaintiff was duly filed and Summons issued.

2. That the Defendants, E. B. BURGETT and WINNIE BURGETT, his wife, were duly served with Summons and a

copy of the Complaint on the 19th day of November, 1975, as evidenced by the Sheriff's return duly filed herein.

3. That the Defendant, EVERETT DALE BURGETT, was duly served with Summons and a copy of the Complaint on the 19th day of November, 1975.

4. That the Defendants, BURGETT WHOLESALE FLORAL COMPANY, a New Mexico corporation, and BURGETT FLORAL COMPANY, a New Mexico Corporation, were duly served with Summons and a copy of the Complaint on the 19th day of November, 1975, as evidenced by the Sheriff's return duly filed herein.

5. That the Defendant, MICHELE IMPORTING COMPANY, was duly served with a Summons and a copy of the Complaint on the 24th day of November, 1975 and subsequently thereto filed its Affidavit of Disclaimer and waiver as to any right or interest in the land herein involved.

6. That the Defendant, VAUGHN-JACKLIN CORPORATION, d/b/a VAUGHAN SEED COMPANY, was duly served with a Summons and a copy of the Complaint on the 1st day of November, 1975, as evidenced by the return duly filed herein. However, VAUGHAN-JACKLIN CORPORATION, d/b/a VAUGHN SEED COMPANY subsequently dismissed out of this action on the 2nd day of March, 1976, as having no right, title or claim of interest to the land herein involved.

7. That the Defendant, STATE OF NEW MEXICO EMPLOYMENT COMMISSION was duly served with a Summons and a copy of the Complaint on the 21st day of November, 1975, as evidenced by the return duly filed herein.

8. That the Defendant, STATE OF NEW MEXICO EMPLOYMENT SECURITY COMMISSION has filed its Answer herein.

9. That Defendant, UNITED STATES OF AMERICA, through its Internal Revenue Service, was duly served with a Summons and a copy of the Complaint on the 24th day of November, 1975, as evidenced by the return duly filed herein, and subsequently on January 30, 1976, dismissed out as



having no right, title or interest in land being foreclosed herein.

10. That the Defendant, DENVER WHOLESALE FLORISTS Co., was not served as it was found they were included by inadvertence and error and were dismissed from this action on the 14th day of July, 1976.

11. That the default of the Defendants, E. B. BURGETT and WINNIE BURGETT, his wife, was duly entered herein by judicial order on the 29 day of January, 1976.

12. That the default of the Defendants, BURGETT WHOLESALE FLORAL COMPANY, a New Mexico corporation, and BURGETT FLORAL COMPANY, a New Mexico corporation, was duly entered herein by judicial order on the 29 day of January, 1976.

13. Summary Judgment against the Defendant, EVERETT DALE BURGETT, pro se, was duly entered herein by judicial order on the 15th day of July, 1976.

14. That this Court has jurisdiction of the parties and the subject matter hereto.

15. That the Plaintiff has sustained, by sufficient and competent evidence, all allegations set out in the Complaint, and that said allegations are taken and considered as true.

16. That the Defendant, STATE OF NEW MEXICO EMPLOYMENT SECURITY COMMISSION, has sustained, by sufficient and competent evidence, all the allegations set out in its Answer, and that said allegations are taken and considered as true.

17. That the Defendants, E. B. BURGETT and WINNIE BURGETT, his wife, are justly indebted to the Plaintiff, in the principal amount of TWO HUNDRED NINE THOUSAND FOUR AND 26/100 ($209,004.26) DOLLARS plus interest accumulation in the sum of NINETEEN THOUSAND TWO HUNDRED NINETY-THREE AND 03/100 ($19,293.03) DOLLARS to the

15th day of July, 1976, with further accumulation at the rate of $66.816 per day to the date of Judgment entered herein, plus reasonable attorney's fees in the amount of $5,000.00, to be set by this Court, plus costs expended herein amounting to $178.55.

18. That the real estate mortgage duly executed by Defendants, E. B. BURGETT and WINNIE BURGETT, his wife, and recorded in Book 375, Page 736, of the Records of Otero County, New Mexico, is a valid and existing first lien on the premises described herein, and secures the repayment of the amount due to the Plaintiff as set forth above.

19. That the Defendant, STATE OF NEW MEXICO EMPLOYMENT SECURITY COMMISSION, has disclaimed all right, title and interest and claims to this cause of action by their disclaimer filed in the Court Record August 5, 1976.

20. That the payments on the note which is secured by the above described mortgage in favor of the Plaintiff, are now in default, and have been in default since the 1st day of February, 1974.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that:

1. The Plaintiff, FEDERAL LAND BANK OF WICHITA, a corporation, have Judgment against the Defendants, E. B. BURGETT and WINNIE BURGETT, his wife; BURGETT WHOLESALE FLORAL COMPANY, a New Mexico corporation; BURGETT FLORAL COMPANY, a New Mexico corporation; and EVERETT DALE BURGETT, in the principal amount of Two HUNDRED NINE THOUSAND FOUR AND 26/100 ($209,004.26) DOLLARS plus interest from the 29th day of September, 1975, at the rate of $66.816 until paid in full, plus reasonable attorney's fees in the amount of $5,000.00, which are hereby set by this Court, plus costs expended herein amounting to $178.55.

2. Mortgage in favor of the Plaintiff, FEDERAL LAND BANK OF WICHITA, a corporation, recorded in Book 375, Page 736,



of the Records of Otero County, New Mexico, a copy of which mortgage is marked Exhibit B and attached to the Complaint filed herein, is a valid and existing first lien on the following described real estate:

> NE1/4 SE 1/4 Section 10, T16S, R13E, N.M.P.M., less lands in deed from E. B. Burgett to H. B. Burgett described in deed recorded in Book 259, Page 322, containing 10 acres;
>
> S1/2 SW1/4; NW1/4 SW1/4; Section 11, T16S, R13E, N.M.P.M.;
>
> together with all water rights and all wells and equipment used for irrigation of said land,

and that said mortgage be foreclosed and the above described property be sold according to the laws and statutes of the State of New Mexico, and that the net proceeds of said sale shall be applied, after the payment of the expenses of said sale, first to the amount due to the Federal Land Bank of Wichita, a corporation, Plaintiff herein, as set forth above.

3. That the Plaintiff or any other party to this suit may become a purchaser at said foreclosure sale.

4. That execution issue for any deficiency which may remain due and owning to the Plaintiff, FEDERAL LAND BANK OF WICHITA, a corporation, after application of all of the net proceeds of any foreclosure sale on the above described property.

5. Frank K. Wilson is hereby appointed Special Master for the purpose of selling the property described in the Complaint, and described above, at a foreclosure sale, in accordance with the laws of the State of New Mexico; and

that he is here authorized a fee of $100.00 for his services as Special Master.

/s/
District Judge

APPROVED AS TO FORM:

FETTINGER AND BLOOM

By /s/
Norman D. Bloom, Jr.
Attorney for Plaintiff

R. Baumgartner
Attorney for State of New Mexico
Employment Security Commission



## APPENDIX B

IN THE DISTRICT COURT OF OTERO COUNTY, STATE OF NEW MEXICO, TWELFTH JUDICIAL DISTRICT

THE FEDERAL LAND BANK OF WICHITA, a Corporation,
*Plaintiff,*

vs.

E. B. BURGETT, ET AL, *Defendants*

### Court's Findings of Fact and Conclusions of Law

1. This Court has jurisdiction over both the subject matter and the parties hereto.

2. Defendants appeared specially for contesting acquisition of jurisdiction in this action.

3. This foreclosure action was filed to this Court on November 18, 1975.

4. E. B. Burgett and Winnie Burgett are Defendants in this cause of action before the Court.

5. E. B. Burgett and Winnie Burgett were each separately served a summons, with a copy of the complaint attached, thereto.

6. No other attempt of service was ever made.

7. E. B. Burgett and Winnie Burgett, at the time this action was filed, were the record owners of the real estate being foreclosed herein.

8. E. B. Burgett and Winnie Burgett were the mortgagors of the mortgage being foreclosed herein by Plaintiff.

ENTERED
REC. 49 PA. 10445

9. E. B. Burgett and Winnie Burgett were each served process on November 19, 1975.

10. Emmett Owens an adult over the age of 18 years of age, served a copy of the summons, with the complaint attached, on both E. B. Burgett and Winnie Burgett by firmly attaching two sets of said summons and complaint enclosed in a clear plastic bag to the most commonly used door of the E. B. Burgett and Winnie Burgett premises and usual place of abode.

11. The door to which a separate summons, with a copy of the complaint attached, for each of the Defendants, E. B. Burgett and Winnie Burgett was attached to the most public door and part of the premises in the usual place of abode of the two Defendants.

12. At the date and time the summons was served on E. B. Burgett ond Winnie Burgett the Defendants, being man and wife, lived in the only house across U.S. Highway 82 from the Burgett Greenhouses located between Cloudcroft and Mayhill, New Mexico.

13. Everett Dale Burgett is the son of E. B. Burgett and Winnie Burgett.

14. Everett Dale Burgett is an adult male over the age of 18 years of age.

15. For at least two-years prior to September 17, 1976, Everett Dale Burgett has been responsible for and has attended to all of the legal and business affairs of E. B. Burgett and Winnie Burgett.

16. E. B. Burgett and Winnie Burgett received a copy of the final decree of foreclosure in this action on August 9, 1976.

17. On or about the 19th day of August, 1976, a copy of the final decree in this action was delivered to these De-



fendants by certified mail to their Artesia, New Mexico residence.

18. E. B. Burgett and Winnie Burgett gave the copy of the final decree of foreclosure received by them on August 9, 1976 to their son Everett Dale Burgett to take care of and do something about it.

19. Everett Dale Burgett was the manager and agent at all times material herein for E. B. Burgett and Winnie Burgett.

20. Everett Dale Burgett was personally served with summons, with a copy of the complaint attached, in this action on November 19, 1975.

21. E. B. Burgett and Winnie Burgett were temporarily in, Artesia, New Mexico when service of process in this case was served on each of them by posting to the most public door of their usual place of abode and legal premises.

22. E. B. Burgett and Winnie Burgett domicile, residence and legal premises on November 19, 1975 was the house were Emmett Owens tacked a summons, with a copy of the complaint attached, for each of the two Defendants.

23. E. B. Burgett and Winnie Burgett usual place of abode and premises was the house to which a summons, with complaint attached, for each of them was tacked on November 19, 1976 by Emmett Owens.

### Conclusions of Law

1. This Court has jurisdiction of both the subject matter and the parties herein.

2. Service of process was properly made upon E. B. Burgett and Winnie Burgett on November 19, 1975.

3. Service of process was properly made upon E. B. Burgett and Winnie Burgett by posting of a summons,

with a copy of the complaint attached, for each of the two Defendants.

4. Notice of service of summons was properly posted and tacked to the most public door and most public part of the premises and the usual place for abode of E. B. Burgett and Winnie Burgett.

5. Separate summons, with a copy of the complaint attached, were posted to the door of the usual place of abode of E. B. Burgett and Winnie Burgett giving both notice of the cause of action filed herein.

6. Everett Dale Burgett, son, manager ond agent for E. B. Burgett and Winnie Burgett was personally served with a summons, with a copy of the complaint attached, hereto and had full knowledge of the action on file herein.

7. E. B. Burgett and Winnie Burgett place of domicile and resident and usual place of abode was the house to which a summons, with a copy of the complaint attached, was posted for each of the two Defendants.

8. The door to which a summons for each of the Defendants, with a copy of the complaint attached, was posted at the most public part of the E. B. Burgett and Winnie Burgett premises.

9. E. B. Burgett and Winnie Burgett were properly served with service of process in this action and had notice of this action of foreclosure.

/s/ Geo. L. Zimmerman
Geo. L. Zimmerman
*District Judge*



## APPENDIX C

IN THE DISTRICT COURT OF OTERO COUNTY, NEW MEXICO
TWELFTH JUDICIAL DISTRICT

No. 17,472

The Federal Land Bank of Wichita, *Plaintiff*,

vs.

E. B. Burgett and Winnie Burgett, et al, *Defendants*.

**Order**

This Matter having come on before the Court on the Motion of the Defendants and with the Plaintiff being represented by its attorneys the Law Firm of Fettinger and Bloom and the Defendant being present in Court and represented by his attorney, Mr. Don Higginbotham, the Court having heard the evidence and examined the exhibits on file herein, both parties having submitted requested Findings Of Fact and Conclusions of Law and the Court being fully advised in the premises having entered its Findings of Fact and Conclusions of Law.

It Is Ordered, Adjudged and Decreed that E. B. Burgett and Winnie Burgett, Defendants in this action, were each properly served with a summons, with a copy of the complaint attached, and the Motion to vacate the sale by Special Master of the foreclosed property herein, is denied.

/s/ Geo. L. Zimmerman
Geo. L. Zimmerman
*District Judge*

## APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

THE FEDERAL LAND BANK OF WICHITA, *Plaintiff-Appellee,*

vs.

E. B. BURGETT and WINNIE BURGETT, et al.,
*Defendants-Appellants.*

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY

**Decision**

(Filed June 13, 1977)

Since there is substantial evidence to support the district court's finding that notice was properly given by posting process on the most public part of appellants' usual place of abode, the decision of the trial court is affirmed.

/s/ DAN SOSA, JR.
Dan Sosa, Jr., *Justice*

*We Concur:*

/s/ JOHN B. MCMANUS, JR., *Chief Justice*

/s/ MACK EASLEY
Mack Easley, *Justice*

ATTEST: A TRUE COPY

ILLEGIBLE
Clerk of the Supreme Court of the State of New Mexico



## APPENDIX E

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Thursday, June 30, 1977

No. 11,304

THE FEDERAL LAND BANK OF WICHITA, *Plaintiff-Appellee,*

vs.

E. B. BURGETT and WINNIE BURGETT, et al.,
*Defendants-Appellants.*

This cause coming on for consideration by the Court upon motion of Appellants for a rehearing, and the Court having considered said motion and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that motion of Appellants for rehearing be and the same is hereby denied.